Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER SESSION, 1976

No. 76-727

CHARLES R. JOHNSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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STANDARD DISTRIBUTORS vs FEDERAL TRADE COMMISSION, 211 F2d 7 (2 Cir. 1954)

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To the United States Court of Appeals
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Charles R. Johnson, your petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of

Appeals for the Eighth Circuit entered in the above entitled cause on August 31, 1976.

OPINION BELOW

The cause was argued before a division of the United States Court of Appeals for the Eighth Circuit. The division rendered its judgment affirming the judgment of the district court, August 31, 1976.

JURISDICTION

The judgment of the U.S. Court of Appeals, was entered on September 28, 1976, and filed in the District Court September 29, 1976. The jurisdiction of this is invoked under 28 USC § 1254(1).

STATEMENT OF QUESTIONS PRESENTED

I.

A.

The Court Committed Error in Finding that Defendant was Responsible for the Acts of the Salesmen of Technical Education Corporation, Committed in Violation of the Salesmen's Agreement and Instructions not to Misrepresent.

B.

The Court erred in Finding that the Steps Taken by Technical Education Corporation to Insure Compliance with the F.T.C. Order by Salesmen is not a Defense to Defendant.

C.

The Court erred in Finding that the Evidence was Sufficient as a Matter of Law to Sustain a Finding that Defendant Violated the Consent Decree of the F.T.C.

STATEMENT OF THE CASE

This is an action wherein the United States brought suit against Charles R. Johnson, an individual, for Civil penalties for alleged violations of a Cease and Desist Order issued by the Federal Trade Commission in 1965. The Order was issued against Technical Education Corporation and Charles R. Johnson, an individual, and as an officer of Technical Education Corporation. The action was not brought against Technical Education Corporation nor was the action brought against Charles R. Johnson as an officer of said Corporation. The Government's evidence consisted primarily of affidavits from prospective students and students and the testimony of Mr. John Wright, a former district sales manager and salesman, for a certain area that the Company was selling in.

Witness John Wright testified that he received a letter concerning the Federal Trade Commission's Cease and Desist Order; however, no one with the Company explained the Order to him except he was cautioned that it had been served "to the School

and was important." (Trial TR 11 and 12)

The defendant offered evidence to show that all salesmen were specifically trained and instructed in all areas of sales presentation. Each salesman, without exception, was provided a letter signed by defendant, C. R. Johnson, dated August 11, 1969 (Defendant's Exhibit G) wherein each salesman was furnished a copy of the Federal Trade Commission decision. The letter further explained that the facts took place in 1965 and that since that date the advertising and sales approach of the Company has been controlled to comply with the FTC Order. The letter further pointed out that any salesman would be terminated if he violated the provisions of the FTC Order. The salesman was instructed to sign an acknowledgment that was furnished with the letter acknowledging that he had received and read a copy of the entire Order issued by the Federal Trade Commission, that he understood all the contents of the four pages, that he is not violating any of the nine articles contained in the order, and that he agrees not to violate any of these provisions. The salesmen further acknowledged

that if he did violate any of the articles, he would be terminated immediately. This was signed by the sales representative and returned to the Company and the evidence showed that this was done in each and every instance without exception. Defendant Charles R. Johnson testified for the defendant, Larry King and John C. Reynolds, Jr., former salesman and sales managers, testified for the defendant and Mr. John Medlin and Robert Remus, both managers for T.E.C. were present and ready to testify; however, a stipulation was entered into concerning their testimony wherein both parties stipulated that both witnesses would testify to the same practice, policy and procedure of the Company as had the other witnesses. (TR. 183) The pertinent part of defendant, Charles R. Johnson's testimony is as follows:

"Q. Okay. Now, back in 1965 eventually you ended up in '69 you entered into a consent decree of judgment is that correct?

A. Yes.

Q. And I think you are obviously aware of

the agreement that you signed with the FTC?

A. Yes.

Q. Now, did you take any steps after that date to comply with all of the other terms and provisions in the agreement that you executed with the F.T.C.

A. It took every step that we could possibly think of so that we would never have a problem.

Q. Okay. Mr. Johnson, let's go through all of them. Tell me the first thing you did to one, make yourself and your company comply with all of the agreements that you entered into with the Federal Trade Commission?

A. Well, when the, number one, we had - - every other data processing firm in the country used IBM's name. IBM was taken out of everything. To the best of my knowledge, there was not a piece of literature the company had from that date on that has IBM on it at that time. We used a check list. We went to a

packaging situation where all of the forms were packaged and issued to district managers, we instituted a very, you know, a very easy way of solving it and when they came in we had a check list that had to be filled out by the girl that was the head of that department and if every form wasn't there the salesman didn't get paid.

Q. Okay. Now, that is that packet that we've been talking about that an employee or independent contractor or representative would receive from you?

A. Right.

Q. Okay. Incidentally, did you execute representative agreements with every person that worked for you?

A. Yes.

Q. Was there any exceptions to your knowledge?

A. None.

Q. Did that apply to district managers?

A. Regional managers, sales managers, to everybody.

Q. Everybody.

A. There were no exceptions. We did not have a man - - the FTC's been in there every year and looked at my files every year and have never found a file that didn't have every piece of paper in it. They did it every year.

Q. Okay. Did the FTC - - strike that. Did you keep copies of every contract that was signed by every representative together with the acknowledgment that he had read the FTC decree and that they would agree to abide by it?

A. Absolutely.

Q. Now, were you also the subject of yearly or more than yearly inspection by the Federal Trade Commission to determine what steps you were taking to prevent any violation of the order?

A. Yes.

Q. Okay. Tell the Court what the FTC did from the time you signed the decree and what you did?

A. FTC was in at least once a year and went, you know, unannounced and came in and went through every salesman's file, and every time found everything in the file that was supposed to be in the file and told me so and, you know, they didn't, I didn't know they were coming and every salesman's file was there.

Q. Okay. Mr. Johnson, - -

A. They would spend about half a day there, you know, and every time they said everything was beautiful.

Q. Let me show you Defendant's Exhibit A, and up on top it shows "Johnson Exhibit 31, 5-1-72 Investigator." Is that what the FTC would take out of your files?

A. They asked every time when they came in for copies of you know, all of the forms because the forms would change and involving different, you know.

Q. Did you also furnish the investigator for the FTC copies of each and every one of those 47 different agreements that were used in the various states you did

business in?

A. We gave them copies of every contract we had at the date that the person came in. (Documents were marked for identification as Defendant's Exhibits E, F, and G).

Q. Let me show you what's been marked Defendant's Exhibit E. which consists of about 12 or 13 different agreements that were furnished by you to the Federal Trade Commission. Is that an example of some of the different contracts that you would prepare for approval by the various states?

A. Yes.

Q. Did the Federal Trade Commission obtain copies of each and every one of those copies from your office?

A. Yes.

Q. Okay. They are stamped - - is there stamping as a matter of fact on there; is that right?

A. Right.

Q. Okay. Now, on each visit by the Federal

Trade Commission investigator, Mr. Johnson, did they ask for a copy of the sales representative's contract?

A. The salesmen contracts? They asked for copies of everything. Mainly they looked through every salesman's file to see if everything there was signed, especially this - -

Q. Acknowledgment?

A. Decree.

Q. Acknowledgment decree. Let me show you Defendant's Exhibit F and ask you if that is one of the representative's sales agreements, representative's agreements that you would use?

A. Yes.

Q. I believe the FTC stamp is on the front page of that?

A. Yes.

Q. And I'll show you Defendant's Exhibit G which is your memo to your representative's agreements that you would use?

A. Yes.

Q. I believe that FTC stamp is on the front page of that?

A. Yes.

Q. And I'll show you defendant's Exhibit G which is your memo to your representatives; is that correct?

A. Yes.

Q. And that was as far back as immediately after entering into the decree?

A. I don't know when the decree was signed but this letter was dated August 11, 1969. It's been used for every salesman and every manager since then without fail. There were no exceptions.

Q. Did they ever suggest to you that anything else in addition to this should be done?

A. No. We did a lot of other things.

Q. Okay. Now, tell His Honor what else you did to comply with the consent decree that you entered into?

A. Well, we solved the IBM problem, to the best of my knowledge.

Q. Okay.

A. Every complaint that came into the office of any serious nature that wasn't you know, I took a look at it and if there was a case of any type of misrepresentation at all, we tried to get the regional manager, we couldn't we went directly to the district manager and directly to the man and got the problem solved. We probably, not probably, we spent more money than any private home study school in the country probably times ten in verification of a student.

Q. Okay. Before you get to that, Mr. Johnson, when you say whenever you got a complaint of misrepresentation you got to the problem and solved it, what would you do to solve it?

A. If there was a problem and there was a misrepresentation, we fired the man and refunded the money.

Q. Without exception?

A. There was no exception.

Q. It didn't matter, if it was, a cooling-

off period had passed or three day period had passed or whatever was involved?

A. If there was misrepresentation, the people got their money back and the man was fired.

Q. Okay. And that was your rule, not, and your practice?

A. We told the man that when we hired him that, you know, they get a chance to make one mistake and that is it, they don't work there anymore.

Q. And that was it?

A. That's right.

Q. Now, how about the verification: what procedure did you use to verify all of these men in the field?

A. Well, it got to be, as the company grew and we were writing a tremendous amount of volume of business, we needed, because to put a student on the books on a federal loan it is a losing proposition, it would cost us internally $50-$60 to put the students

on the books, to set up the computer to do all of the in-house stuff, issue lessons and everything else, so we went to a WATS line where we called the students and verified the certain person's information, if he realizes he enrolled this, he realizes, does he understand it is not a gift on the federal law loan, that he does have to start payment, that he does have to study, and there was a regular check list of this.

Q. Did you do that with every student's application?

A. Did it with every student that we could possibly reach. The ones we couldn't, we sent telegrams. Now, this is in addition from 19 - - well, prior to 1969. We felt that if you are going to have a problem with a student, let's have if you are going to have a problem with a salesman, let's find out what the problem is and find out fast, so in our acceptance letter, our letter, our

our acceptance letter did not say, "Dear John" We thank you for becoming a student of Technical Education." Our letter says, "Thank you for becoming a student of Technical Education. Your course that you enrolled for costs blank. Your payments will be this and you understand the refund," and so forth and everything was spelled out in their acceptance letter that went out with their first shipment which had their student number and everything else. So it is a letter that he would read. We did it for one reason. If there was going to be a problem, we wanted to know the problem going in instead of waiting six months and then having a problem and then even, you have a salesman that maybe is misrepresenting, he is going to misrepresent for several months before you find it. This way, if you are going to have a problem you

you find out immediately and you can solve it.

Q. Okay. What else did you do?

A. Well, it got to be where we had so many papers that the salesman had to sign and had to do and the training period got so long that some of our managers said that they'd be better off if they sold us paper than work for us. We tried to take every step possible so there wouldn't be any problems because, you know, not only the FTC, it was every state in the HEW, all the accrediting commissions. We were trying to please everybody. We had more people looking at us than anybody in the country, - -

Q. Okay.

A. - - and we did not ever have a problem with any of them until the roof fell in on me, and until they took it away from me.

Q. Okay. You had not had any problem with the Federal Trade Commission or any complaint with the Federal Trade Commission

prior to the foreclosure; is that right?

A. No, sir, not that I know of. The last person that was there in the investigation said, "Mr. Johnson," he said, "if every school ran an operation like yours we'd be tickled pink." I don't know her name. She's on there. She is from Kansas City.

Q. Okay. You had no complaints then until you were foreclosed on and out of business?

A. That's right.

Q. Okay. Now, the salesman's training also included sales presentation and what they could say and what they could not say; is that right?

A. Right.

The pertinent part of the testimony of Larry King is as follows:

Q. What area did you cover as regional sales manager?

A. Basically the, I guess you would say the South meaning well, I guess, all of

Missouri, a portion of Missouri, Arkansas, portion of Tennessee, portion of Louisiana, a portion of Mississippi and some up into Illinois.

Q. Okay. How many men did you have working in that area for you?

A. Well, that varied considerably.

Q. What would it normally be, average?

A. I would say from six to 125, somewhere in that neighborhood.

Q. Okay. Now, did - - were each one of these salesmen given a training course?

A. A definite training outlines were followed, whether I gave the training or whether any one of the managers gave the training, whether it be Larry Reynolds or John Giles or whomever (sic).

Q. Were they all instructed on sales presentations?

A. Most definately. They were all given training outlines and they had to know it verbatim.

Q. Were they all given employment or rep-

resentatives' agreements?

A. Most definitely.

Q. Okay. And were they all given copies of the FTC decree?

A. Without exception.

Q. And did everyone sign any acknowledgment for the receipt of each one and that they had read it?

A. They had to or they wouldn't get a check.

Q. How long did all of this take?

A. You mean to train and go through all of this?

Q. Right.

A. Usually two full days, sometimes three, depending on the schedule, maybe more, but basically I'd say two and a half days.

The pertinent part of the testimony of John R. Reynolds, Jr., is as follows:

Q. And do you remember signing an acknowledgment concerning a certain Federal Trade Commission consent decree that I

believe was attached to that? Let me show you this memo to all representatives from C. R. Johnson concerning that. Would you take a look at that, please?

A. It was in the sales kit, you know. We had to sign it.

Q. Did you sign that?

A. Yes.

Q. Did you read the Federal Trade Commission consent decree, Mr. Reynolds?

A. Yes.

Q. Were you familiar at that time with, particular portions of the decree?

A. I'm not sure if I was familiar with all of them or not, but I know that whatever it was in here, you know, if the, if everything was printed in here I am familiar with them.

Q. Okay. Did you also agree as part of your sales representative agreement that you would not make any sales presentations that would be in conflict

with that?

A. Yes.

Q. Did you also sign an acknowledgment that you had read this and that you would follow and abide by it?

A. Yes.

Q. Okay. Now, was there any monitoring salesman at TEC during the period of time that you were in the field as a salesman?

A. At the time I was in the field as a salesman?

Q. Right.

A. Yes.

Q. Okay. Can you tell His Honor the type of monitoring that the company did to try to make sure the salesmen conformed to the agreements that they entered into?

A. Well, we had another man, manager, ride with us on several different occasions to make sure that we were giving the proper presentation.

Q. Did you ever do anything else such as record your presentation and furnish that to the sales manager?

A. Not at the time I was a salesman. We started doing it after I got into management.

Q. Okay. What did you do then after you were in management and in an effort to make sure the salesmen conformed to the sales presentation?

A. Well, in the first place, whenever anyone was hired, it was standard procedure that they knew about the consent decree. Then we trained them in the field. We held classes with them, weekly classes. We recorded presentations and not so much to make sure that they weren't misrepresenting a presentation, but to make sure that the salesman was giving the professional slant to the students because many cases the students didn't understand, he surely wouldn't enroll.

Q. Okay. What area did you manage as a district sales manager, Mr. Reynolds?

A. As a district sales manager?

Q. Yes, or regional?

A. I went through both steps. When I was a district manager I worked some Memphis, Tennessee. Regional sales manager, I ran the Detroit operation.

Q. While you were in Memphis, did you have occasion to interview a Mr. John Wright?

A. Yes.

Q. Did you hire him?

A. Yes.

Q. Did Mr. Wright go through the same procedure that every other salesman for the company goes through?

A. Yes, he did.

Q. And were you aware of Mr. Wright's educational background?

A. Yes, I am.

Q. And did he sign all of the agreements including the acknowledgment that he had read the FTC agreement?

A. Yes, he did.

Q. Was this a standard procedure of all employees in the company.

A. For all salesmen. They could not get paid without it. It was part of the - - everything came in a little package.

Q. In the sales kit?

A. When you ordered the sales kit, all the forms were there, application forms, the whole thing. If any of them was missing they weren't issued paychecks until we got the proper form in the office.

Q. Okay. Did Mr. Wright receive instruction as to sales presentations, as to what to say to the prospective students?

A. Absolutely.

Q. And every other salesman that was employed by you?

A. Absolutely. You can't, oh, you can't put a man in the field and expect him to sell anything without training, you know, it is just impossible.

Q. Okay. Now, can you tell us whether or not all of the sales persons that you hired were trained in the same manner that you just described to the Court?

A. Yes, they were.

Q. Was anybody put out in the field without being advised of what they could say, also without being advised that the FTC order prohibited making certain statements?

A. No.

Every salesman and representative of the Company signed the sales representative contract (Exhibit F). The contract was a detailed thirteen page agreement setting out the terms of employment. Attached to that contract was the letter of defendant, Johnson, explaining the Federal Trade Commission order, a copy of the decision and order was attached. The sales representative then signed an acknowledgment that they had understood the contents of the Order, would not violate the order and would be terminated if they did in fact

violate the Order.

The district court states at page 211 of the transcript, "The next question is what about this man personally? Now, there's been, there's not been a substantial amount of evidence to show that this man is responsible personally or had any knowledge of any of these violations . . .".

REASONS FOR GRANTING THE WRIT

I.

A.

The Court Committed Prejudicial Error in Finding that Defendant Was Responsible for the Acts of the Salesmen of Technical Education Corporation Committed in Violation of the Salesmen's Agreement and Instructions not to Misrepresent.

B.

The Court Erred in Finding That the Steps Taken by Technical Education Corporation to Insure Compliance With the F.T.C. Order by Salesmen is not a Defense to Defendant.

C.

The Court erred in Finding that the Evidence was Sufficient as a Matter of Law to Sustain a Finding That Defendant Violated the Consent Decree of the F.T.C.

The General rule is that it is not necessary to include individual officers in a cease and desist

order, however, there have been many cases wherein the orders including the individual officers have been affirmed. In Doyle vs Federal Trade Commission, 256 F2d 381, the Court reviewed the propriety of including one respondent in the cease and desist order. In Doyle, the court held that there was no evidence in the record to indicate any possible evasion of the cease and desist order. In Doyle, the court held that there was no evidence in the record to indicate any possible evasion of the cease and desist order by the corporation and therefore there was no legitimate reason for including Doyle in the order. However, the Court does review the general law and the exceptions pertaining thereto and states:

"Since orders running against a corporation are automatically binding on the officials 'responsible for the conduct of its affairs' (Wilson v United States, 221 U.S. 361, 376,) individuals may be punished by contempt if they prevent compliance by the corporation with the order, there seems to be little reason for including corporate officers as individuals in the orders unless there is a possibility of evasion, as was present in Federal Trade Commission v. Standard Education Society, supra. The Supreme Court made this clear in Hartford-Empire Co. v. United States, 123 U.S. 386, 65 S. Ct. 373, 89 L. Ed. 322 (1945) a case concerning the issuance of injunctions to prevent further violations of the Sherman Act. As was stated at page 434,65 S. Ct. at page 396:

Any injunctions addressed to a corporate defendant may as various sections of the decree do, include its officers and agents. If the individual defendants are officers or agents they will be comprehended as such by the terms of the injunction. If any one of them cease to be such, no reason is apparent why he may not proceed, like other individuals, to prosecute whatever lawful business he chooses free of the restraint of an injunction.

On the other hand, if new officers and directors take the places of these defendants, such new agents will automatically come under the terms of the injunction. There is no apparent necessity for including them individually in each paragraph of the decree which is applicable to the corporate defendants whose agreements and cooperation constitute the gravamen of the complaint. That these individuals may have rendered themselves liable to prosecution by virtue of the provisions of § 14 of the Clayton Act is beside the point, since relief in equity is remedial, not penal.

This reasoning applies with equal weight to the issuance of cease and desist orders."

"There appear to be two notable exceptions to this restrictive application of Federal Trade Commission cease and desist orders to individuals in sham corporations. In Standard Distributors Inc. vs. Federal Trade Commission, 211 F 2d 7, 15 (2 Cir. 1954) a divided court held that the officers in top control of a company, whether a sham corporation or not, may be included in a Federal Trade Commission order as individuals. And

in Benrus Watch Co., Inc. vs Federal Trade Commission, 352 F2d 313 (8 Cir. 1965), the court held that officers of the company who "formulate, direct and control corporate policies and practices" may properly be included in the order as individuals even though they have since left the employ of the corporate respondent. In neither or these two decisions did the court concern itself with the necessity for a "threat of evasion" prior to including the individuals under the order. However, in both these cases the individuals involved were officers in top control of the corporation; formulating, directing, and controlling corporate policies and practices."

We don't know why Johnson was included in the original cease and desist order. The question of his inclusion in the Order is really not before the Court. Nor does appellant feel that it is relevant to appellant's position.

We have to look at defendant Johnson's conduct after the order was entered to determine if he had some degree of complicity in the violations by the offending sales representatives. The district court points out that there was no evidence in the record to indicate that Johnson had any knowledge or was personally responsible for any of the violations (TR 211 + 212).

Technical Education Corporation was a

large, well organized company. There was nothing in the record to show that the corporation was a sham or that Johnson acted as if there were in fact no corporation. There were as many as 300 sales representatives at one time plus a large office force and school staff. The Company did business in 47 states and was nationally accredited (TR 190). The school was approved for every type of program by the Veteran's Administration (TR 190). The defendant had 24 years experience in the area of home study (TR 184).

In Standard Distributors vs. Federal Trade Commission, 211 F 2d 7, the second Circuit reviewed the question of whether or not the president of the corporation should be kept in as a defendant in a cease and desist order. In Standard Distributors we have a "previolation stage" of a cease and desist order. The salesmen were specifically instructed in writing concerning the sales presentation and the statements they could make relative thereto. The salesmen violated their instructions. The Petition for a Cease and Desist Order followed and the President of the corporation

was included in the cease and desist order. The dissenting opinion of Judge Chase points out cogent reasons for not including the president in the original cease and desist order. The majority opinion of Judges Medina and Hand affirm the order and include the president in the order but very carefully point out that it would be a different question before the court if the salesmen violate a cease and desist order after it is entered without any complicity by the president. The pertinent part of the dissenting opinion of Judge Chase is as follows:

"Nevertheless, the Commission found, also on adequate evidence, that these misrepresentations were made by the corporation petitioners salesmen in spite of efforts the petitioner made to prevent that. Those efforts included investigation of them when they were employed, extensive instruction in proper selling methods and the signing of a pledge by each salesman that he would not, under penalty of discharge for violation, represent:

"a. That the encyclopedia or other books are free.
b. That the customer is paying only for the revision (supplement) or other services.
c. That the offer is open only to a certain specified number of people in any given area or community.
d. That only a certain few are chosen or selected to receive the offer.
e. That the regular or usual price of the books or combination of books and

services is greater than the price at which they are being sold when such is not the fact.

f. That the encyclopedia or other publication is an entirely new work."

Not only was this done, but the corporate petitioner sent its salesmen printed instructions to the same effect several times a year and instructed each salesman to hand to each prospective purchaser a copy of its written contract under which the books were sold and to have the contract read by the prospective purchaser, or to read it to him, and to answer any questions he might ask before it was signed. Finally, in addition to their regular commission the salesmen were given a bonus of $4, after the purchase price was fully paid, on each sale made but whenever a sale was cancelled the salesman were not only penalized that bonus, but also the bonus on two paid up sales in addition. The Commission also found that, "there is nothing in the record to indicate that respondents' (petitioners') efforts to prevent their salesmen from making the misrepresentations which they are found to have made were not earnest and honest." Thus there is presented a situation where the salesmen did induce sales, to the extent and effect as found, by misrepresentations which were made in violation of their instructions and despite honest efforts by the petitioners which were well calculated to prevent that.

They were nevertheless the authorized agents of the corporate petitioner, though not of petitioner Bimstein, to sell the books. The misrepresentations they made were at least within the apparent scope of their authority and part of the inducement by which were made sales that inured to the benefit of the corporate petitioner. Unsuccessful efforts by the principal to prevent such misrepresentations by agents will not put the principal beyond the reach of the Federal Trade Commission Act.

Perma Maid Co., Parke, Austin & Liscomb, Inc. v. Federal Trade Commission, 2 Cir., 142 F 2d 437,440.

Though the corporate petitioner dealt with its salesmen in compliance with Rule 16, Trade Practice Conference Rules for the Subscription and Mail Order Book Publishing Industry and used a contract which, if read, would advise the prospective purchasers of the actual facts without misleading statements that is not decisive in these proceedings. Rule 16 does imply that members of the industry who honestly comply with its letter and spirit shall not be held to have engaged in unfair practices but the rule is merely advisory and in no way deprives the Commission of statutory jurisdiction it otherwise would have. This might be relevant on the question of public interest in that the Commission might, in part because of it, conclude that where such efforts were made as here were shown to prevent misleading practices, and the instances of misrepresentation were as comparatively small as these were, the situation might remedy itself. However, the matter of public interest is one in which the discretion of the Commission is broad. Ford Motor Co. v Federal Trade Commission, 6 Cir. 120 F 2d 175. Consideration is to be given not only to the detriment to the purchasing public from deceptive selling methods but the unfair competition with competitors which is involved and the determination of the Commission in this respect has adequate support in this record. Federal Trade Commission v. Real Products Corp., 2 Cir. 90 F 2d 617. Nor does discontinuance of the unlawful practices make the proceeding moot. Federal Trade Commission v. Goodyear Tire & Rubber Co., 304 U.S. 257, 260,58 S. Ct. 863, 82 L. Ed. 1326. We all agree that the order against the corporation should be enforced.

Petitioner Bimstein, though the officer of the corporate petitioner, who as its president was

in what we may call over-all charge of its salesmen, was not their employer and the sales they made were not for him. This was not a sham corporation but one actually conducting a business of its own. The salesmen were its agents and not his. Their misconduct as its agents is not imputable to him as it is to their employer to make it subject to remedial orders by the Commission in furtherance of the attainment of the objectives of the Act. He acted in good faith, with due diligence, to prevent the misrepresentations made by the salesmen. This serves, I think, to distinguish his relationship to the unlawful acts of the salesmen from that of the individuals who were held in Federal Trade Commission v. Standard Education Society, supra, to be subject to a cease and desist order."

The majority opinion of Standard Distributor's was written by Judge L. Hand and the relevant part is as follows: Standard Distributors vs FTC supra, at page 14 and 15.

L. HAND, Circuit Judge

"Judge Medina and I agree with Judge Chase in all that he decides and in his reasons, except as to the president of the company, Bimstein, who in our judgment should be kept in the "cease and desist" order. When the case of Federal Trade Commission v. Standard Education Society, was before us, 2 Cir., 86 F 2d 692, we refused to enforce any part of the order against one of the three incorporators, Greener, and modified it against the other two. We thought that the responsibility of each of the three turned upon whether he had been "shown to have had such connection with the wrong as would have made him an accomplice were it a crime, or a joint tortfeasor, were the corporation an individual." 86 F 2d at page 695. This the Supreme Court reversed, holding, 302 U.S. at page 119, 58 S. Ct.

at page 117, that since incorporators would be bound by a cease and desist order after it was made and since "further efforts of these individual respondents to evade the orders of the Commission might be anticipated, it was proper for the Commission to include them." So far, the reversal does indeed appear to have depended upon the circumstance that the incorporators had in that instance formed the company in order to avoid any action by the Commission. However, the Court proceeded, 302 U.S. at page 120, 58 S. Ct. at page 117, to say that as all three "dominated and managed" the corporation and "acted with practically the same freedom as though no corporation had existed"; they were "the actors" and therefore the Commission was free to decide that it was necessary to include them if the order "was to be fully effective in preventing the unfair competitive practices which the Commission had found to exist."

We read this as meaning that such an order may include those officers of a corporation who are in top control of the activities that the Commission finds to have violated the Act; and two later decisions - one of them our own - have apparently also so read it. It is indeed true that this results in holding such an officer responsible for the conduct of those who are not his agents; and, moreover, that it deprives him of the immunity that the invorporation of a venture ordinarily gives to the incorporators. However, we do not see that it is any severer a responsibility than that of a principal for the conduct of his agent within the scope of an "apparent authority" that he may have done his best to circumscribe. It is true that "apparent authority" has at times been said to result from estoppel; but that is not true, for the principal is held, even though the third person does not rely in any way upon the authority; as, for example, in the case of a tort. As Professor Wigmore long ago pointed out, the doctrine in such cases is more or less rationalized vestige of altogether different notions whose provenience goes back to the archaic law of status. So far as it

any longer satisfies our present demands of justice, it is because, since the principal has selected the agent to act in a venture in which the principal is interested it is fair, as between him and a third person, to impose upon him the risk that the agent may exceed his instructions subject, indeed, to limits, vaguely left open, upon his "apparent authority".

Much the same argument seems to us to be permissible, when, as here, no agency exists. Bimstein had the entire control over what the salesmen should do and say, so far as any control was possible at all; and the order imposes no greater burden on him than it would have, if he had been a formal principal; for the salesmen did not exceed their "apparent authority." The situation is, indeed, much like that that arose under the Wagner Act, 29 U.S.C.A. § 151 et seq., before its revision, when an employer was held guilty of an "unfair labor practice," committed by employees who had acted beyond any "Apparent authority".

Finally, we cannot think that § 45 (1) of the Act has changed this responsibility. If the law was as we think it was before that section was passed, its passage ought not to affect that pre-existing scope of a "cease and desist" order. It is indeed a different question whether, if after this order has been affirmed, some of the salesmen violate it without any complicity by Bimstein, a prosecution against him under § 45 (1) will lie." (our emphasis)

The dissenting opinion of Judge Chase clearly sets forth the standard the Court should follow. The majority opinion points out that the questions of a violation by the salesmen after the cease and desist order has been issued without complicity of the president is a different question

of law. That is the precise issue before this Court. The judgment of the district court imposes a standard of strict liability upon the officers of a corporation whose representatives, without complicity of the officers, violate a cease and desist order contrary to the instructions and directions of the officers and contrary to the representatives own acknowledgment that he or she will not violate the orders and instructions.

I find it difficult to perceive that Congress intended such a standard for a civil penalty violation. The standard of a liability in a criminal prosecution requires, at the very least, some degree of knowledge of the acts or acquiescence therein, before the defendant can be held responsible for the acts of others.

The defendant acted in good faith to insure that the representatives of the Corporation did not violate the terms of the cease and desist order. There was no evidence in the record to show that the defendant either violated the cease and desist order himself or that he had complicity in the violations by the sales represen-

tatives. The cease and desist order named Johnson individually and as an officer. He did not, as an individual, violate the cease and desist order. He did not violate the order as president. The sales representatives made sales for the corporation, not for Johnson. The salesmen were agents of the corporation and not of Johnson. Their misconduct is not attributable to Johnson. There was nothing more that Johnson could humanly do to insure the corporation's compliance with the Federal Trade Commission's order.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

THEODORE F. SCHWARTZ
7701 Forsyth Suite 560
Clayton, Missouri 63105
Attorney for Petitioner

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 76-1959

UNITED STATES OF AMERICA,	*	
	*	
Appellee,	*	Appeal from the
	*	United States District
vs	*	Court for the Eastern
	*	District of Missouri
CHARLES R. JOHNSON,	*	
	*	
Appellant.	*	

Submitted: May 13, 1976

Filed: August 31, 1976

Before HEANEY and HENLEY, Circuit Judges, and SCHATZ, District Judge*

SCHATZ, District Judge

The United States brought suit pursuant to 15 U.S.C. § 45(1) against Charles R. Johnson for civil penalties for twenty violations of a cease and desist order issued by the Federal Trade Commission and for an injunction requiring Johnson to comply with the order. The District

Court [1] found that the Federal Trade Commission order was directed against both Technical Education Corporation (T.E.C.) and Johnson who was responsible for the actions of the T.E.C. salesmen, and that providing a copy of the cease and desist order to T.E.C. salesmen was not a defense to the action. Johnson was fined a total of $40,000 and permanently enjoined from violating the terms of the F.T.C. order. Johnson appeals, arguing that he should not be held individually liable for the violations. We affirm the District Court.

Mr. C. R. Johnson was the president and sole stockholder of Technical Education Corporation, a company organized by Johnson to promote and to conduct home study courses in the field of data processing. The Federal Trade Commission consent decree of July 29, 1969, which became effective October 9, 1969,

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*The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska, sitting by designation.

1 The Honorable James H. Meredith, Chief Justice United States District Court for the Eastern District of Missouri.

directed T.E.C., its officers, agents and employees, and Johnson, individually and as an officer of the corporation, to cease utilizing specific promotional methods which were found to be unfair methods of competition and unfair and deceptive acts and practices in violation of the Federal Trade Commission Act.

The propriety of including a person both as an individual and as a corporate officer in a cease and desist order has consistently been upheld in instances where the person included was instrumental in formulating, directing, and controlling the acts and practices of the corporation. F.T.C. v. Standard Education Society, 302 U.S. 112 (1937); Standard Distributors v. F.T.C., 211 F. 2d 7 (2d Cir. 1954); Benrus Watch Company v. F.T.C., 352 F. 2d 313 (8th Cir. 1965).

Johnson did not directly challenge his inclusion in the July 29, 1969, order by appeal and does not urge its impropriety in this action. Nor does he challenge the finding

of the lower court that the alleged violations did occur. His position is that he attempted in good faith to assure compliance with the F.T.C. order by informing T.E.C. salesmen of the order, that any subsequent violations of the order by T.E.C. employees can only be attributed to the corporation, and that as a result he should not be held individually responsible for the acts of those who are not his agents.

The Federal Trade Commission in the interests of protecting the public against methods of unfair competition and unfair and deceptive trade practices ordered T.E.C. and Johnson to refrain from engaging in certain practices in advertising and offering for sale home study courses in the electronic data processing field. The effect of this order was to impose on Johnson an affirmative duty to assure that T.E.C., the company which he founded, owned and operated, would cease using the promotional practices which the F.T.C. found to be in violation of the law. This duty could not be discharged by Johnson if he simply did nothing. See In Re Dolein

Corp., 247 F. 2d 524 (D.C. Cir. 1956), cert. denied, 353 U.S. 988 (1957).

Johnson argues that by providing each salesman with a copy of the F.T.C. order he acted in good faith to assure compliance with the order. But from the evidence presented in the court below, it clearly appears that this effort was superficial at best. The order was a small part of the sales packet provided to new salesmen when they were hired. Its import appears not to have been emphasized in the process of training new salesmen. While Johnson formulated, directed and controlled the operations of T.E.C., the evidence indicates widespread use of methods of solicitation of prospective customers which were specifically prohibited by the cease and desist order. The philosophy communicated to T.E.C. salesmen was to enroll any person who could "walk and chew gum at the same time." In short, we are not pursuaded that Johnson in good faith did everything in his power as the chief executive of T.E.C. to assure compliance with the F.T.C. order.

In any case, the good faith effort of the person to whom the cease and desist order is addressed to assure compliance with that order is generally not a defense to an action for civil penalties for violation. See United States v. Beatrice Foods Company, 344 F. Supp. 104 (Supp. Op. 351 F. Supp. 969) (D. Minn. 1972), aff'd, 493 F. 2d 1259 (8th Cir. 1973), cert. denied, 420 U.S. 961; United States v. Ancorp National Services, Inc., 516 F. 2d 198 (2d Cir. 1975), affirming 367 F. Supp. 1221 (S.D.N.Y. 1974); Guziak v. F.T.C. 361 F. 2d 700 (8th Cir. 1966); United States v. Vitasafe Corporation, 212 F. Supp. 397 (S.D.N.Y. 1962), and United States v. H. M. Prince Textiles, Inc., 262 F. Supp. 383 (S.D.N.Y. 1966). The Federal Trade Commission Act was designed to protect the public from unfair trade practices. Where such practices have occurred, liability for civil penalties arises without a need for any showing that the practices were intentional or malicious. See the cases cited, supra.

In view of the lower court's uncontroverted

and correct determination that the alleged violations of the cease and desist order did occur, the Court properly determined that Johnson's efforts to insure compliance with the order were not a defense to the instant action.

The only question remaining is whether liability can be imposed upon Johnson individually for these violations. It is generally true that a principal can be held liable for the actions of his agent if the agent is acting within the scope of his apparent authority. Thus, the Second Circuit in Standard Distributors v. F.T.C., 211 F. 2d 7 (2d Cir. 1954) held a corporation responsible for the misrepresentations of its salesmen in violation of the direct instructions of the company, stating:

> (The salesmen) were nevertheless the authorized agents of the corporate petitioner . . .to sell books. The misrepresentations they made were at least within the apparent scope of their authority and part of the inducement by which were made sales that inured to the benefit of the corporate petitioner. Unsuccessful efforts by the principal to prevent such misrepresentations by agents will not put the principal beyond the reach of the Federal Trade Commission Act.

Id. at 12. See also Goodmen v. F.T.C. 244 F. 2d 584 (9th Cir. 1957).

In Standard Distributors, the Court, speaking through Judge Learned Hand, went on to extend the responsibility for those misrepresentations to the chief officer of the corporation stating:

> We interpret (F.T.C. v. Standard Education Corporation) as meaning that (a cease and desist order) may include those officers of a corporation who are in top control of the activities that the commission finds to have violated the act . . . . It is indeed true that this results in holding such an officer responsible for the conduct of those who are not his agents; and moreover; that it deprives him of the immunity that the incorporation of a venture ordinarily gives to the incorporators. However, we do not see that it is any severer a responsibility than that of a principal for the conduct of its agent within the scope of an "apparent authority" that he may have done his best to circumscribe . . (S)ince the principal has selected the agent to act in a venture in which the principal is interested, it is fair, as between him and a third person, to impose upon him the risk that the agent may exceed his instructions . . . Much the same argument seems to us to be permissible when, as here, no agency exists. (The president of the corporation) had the entire control over what the salesmen should do and say, so far as any control is possible at all; and the order imposes no greater burden on him than it would have if he had been a formal principal; for the salesmen did not exceed their "apparent authority."

Id. at 15.

This Court finds the reasoning of Judge Hand persuasive in the instant case. Johnson was

the organizer, sole stockholder and chief executive of Technical Education Corporation. The evidence indicates that he was responsible for establishing the policy and directing the operations of the company. When he acted, the corporation acted.

Inasmuch as the order of the Federal Trade Commission properly included Johnson individually, and inasmuch as the violations of the order did occur, the District Court properly assessed the appropriate penalties against Mr. Johnson individually.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

APPENDIX B

COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	
vs	)	
	)	No. 74-572C(1)
CHARLES R. JOHNSON,	)	
	)	
Defendant.	)	

COMPLAINT

The United States of America, acting upon the certification to the Attorney General by the Federal Trade Commission (hereinafter, "the Commission"), brings this action under Sections 5(1) and 9 of the Federal Trade Commission Act (15 U.S.C. Sections 45 (1) and 491, as amended, Pub. L. No. 93-153, Section 408(c) (Nov. 16, 1973), to recover civil penalties for violations of a final order to cease and desist issued by the Commission, and to secure injunctive relief, and alleges:

JURISDICTION AND VENUE

1. Subject matter jurisdiction is predicated upon 28 U.S.C. Sections 1331(a), 1337, 1345 and 1355.

2. Venue in the Eastern District of Missouri is based upon 28 U.S.C. Sections 1391(b), 1391(c) 1395(a).

DEFENDANT

3. Charles R. Johnson, Defendant, was at all times material herein, an officer and principal stockholder in Technical Education Corporation, a Missouri corporation (hereinafter, "the corporation") with its principal office and place of business located at 5701 Waterman Boulevard, St. Louis, Missouri. Defendant Johnson's current residence is located at 411 DeBaliviere, St. Louis, Missouri, and he holds Postal Box #11901, St. Louis, Missouri, 63112.

4. At all times material herein, defendant, Johnson, formulated, directed and controlled the acts and practices of the corporation.

5. At all times material herein, defendant, was engaged in the advertising for sale, and distribution of courses of study and instruction in the field of data processing and/or computer programming in interstate commerce. Through the corporation, defendant employed certain representatives who solicited individual student applications for enrollment in defendant's school.

PRIOR COMMISSION PROCEEDINGS

6. A Federal Trade Commission proceeding hearing Docket Number C-1569, in which the defendant and the corporation were charged with violating Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45 (a)), terminated with the consent of the defendant and the corporation of an order to cease and desist, a copy of which is attached hereto as Exhibit A. This order became final by operation of law on October 6, 1969. Included in this order is the following language:

> "IT IS ORDERED that respondents Technical Education Corporation,

a corporation and its officers, and C. R. Johnson, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of courses of study and instruction in the field of data processing or any other subject in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

* * * *

"(2) Representing, directly or by implication, that respondents or their school are sponsored by, approved by or have any connection with the International Business Machines Corporation (IBM) other than to provide training or instruction in the operation or equipment manufactured or distributed by IBM; or misrepresenting, in any manner, the status or affiliation of respondents, their school or their sales representatives.

* * * *

"(3) Representing, directly or by implication, that respondents' school is licensed or registered in any state unless it is so licensed or registered and unless in immediate connection with such representation respondents clearly and conspiculously disclose the meaning, if any, of such licensing or registration; or misrepresenting, in any manner, the import or effect of licensing, registration or any other action by a state or other jurisdiction.

"(4) Representing, directly or by implication, that persons who complete respondents' courses are guaranteed or assured of employment in the positions for which they have been trained; or misrepresenting, in any manner, the ability, efforts or facilities of respondents or their placement service for assisting persons completing respondents' courses in obtaining employment.

"(5) Representing, directly or by implication, that an aptitude or other test is adequate to measure the aptitude or ability of an ability of an enrollee to successfully complete respondents' course and attain the advertised objectives of the course unless such test is based upon established personnel testing practices in the data processing field; or misrepresenting, in any manner, the selectivity exercised by respondents in enrolling students in their courses or the qualifications which students must possess to be accepted for enrollment.

"(6) Representing, directly or by implication, that a prospective student may enroll in respondents' home study courses only at the time of the visit by respondents' sales representative or that if the student is not enrolled at the time the opportunity to enroll will have been lost; or misrepresenting, in any manner, that the opportunity to enroll in respondents' courses is limited.

"(7) Inviting or obtaining inquiries concerning respondents' courses from prospective students without clearly informing such persons rea-

sonably in advance thereof that respondents' sales representative will call upon them and seek to enroll them in one of respondents' courses.

"(8) Failing to:

"a" Furnish to prospective students at time of enrollment a printed statement clearly and conspicuously disclosing (1) the exact conditions and terms under which a student may discontinue his or her enrollment prior to completion of the course in which enrolled and (2) such refund of money, if any, or other adjustment that respondents will make in the obligation of the student who requests withdrawal or discontinuance in accordance with respondents' terms and conditions therefor.

"(b) Set forth the disclosures required by (a) preceding clearly and conspicuously in and as a part of the enrollment application or such documents as may be executed by prospective purchasers of respondents' courses.

"(c) Require their sales representatives or other persons who visit prospective purchasers of respondents' courses and solicit their enrollment in respondents' courses to orally inform and advise prospective purchasers of the information required to be disclosed by (a) and (b) preceding.

"(d) Clearly and conspicuously disclose to prospective purchasers of respondents' courses prior to enrollment that the collection of student accounts may be undertaken by a designated agency that such action does not affect such rights to discontinuance or affirmative defenses as the student may have."

7. Plaintiff realleges and incorporates by reference in each of the twenty (20) Counts set out herein all of the allegations contained in Paragraphs 1 through 6 of the complaint.

COUNT ONE

8. On or about January 14, 1972, for the purpose of inducing the sale of a course in computer programming/data processing, defendant acting through his authorized agents:

(1) Represented, to Mr. Aaron G. Hatch, Jr., of Memphis, Tennessee, that defendant's school was connected with International Business Machines Corporation (IBM) in violation of paragraph 2 of the order;

(2) Misrepresented to him, the qualifications which students must possess to be accepted for enrollment in the course, in violation of paragraph 5 of the order;

(3) Failed to disclose to him by way of a separate printed statement, either (a) the terms and conditions

under which a student may discontinue or cancel enrollment prior to completion of the course or (b) such refund or adjustment defendant would make upon cancellation, in violation of paragraph 8 (b) of the order and;

(4) Failed to disclose to him that his contract may be turned over to a collection agency, and that such action would not affect his cancellation rights, in violation of paragraph 8(d) of the order.

COUNT TWO

9. In or about August, 1971, for the purpose of obtaining leads to prospective purchasers of courses of study in the school, defendant, acting through his authorized agents, represented to Miss Debra Martin of Reedsville, West Virginia, that she could receive free information concerning career opportunities and further, failed to inform her then or within a reasonable time thereafter that defendants sales representative would call upon her, in violation of paragraph 7 of the order. There-

after, on January 14, 1972, for the purpose of inducing the sale of a course in computer programming, defendant acting through his authorized agents:

(1) Represented to Miss Martin, that she was assured of a job in the field for which she would be trained upon graduation, in violation of paragraph 4 of the order;

(2) Represented to her that she must enroll for the course that same day or her opportunity to enroll would be lost, in violation of paragraph 6 of the order;

(3) Failed to orally inform her of either (a) the terms and conditions under which a student may discontinue or cancel enrollment prior to completion of the course of (b) of such refund or adjustment defendant would make upon cancellation, in violation of paragraph 8(c) of the order and;

(4) Failed to disclose to her that her

contract may be turned over to a collection agency and that such action would not affect her cancellation rights, in violation of paragraph 8(d) of the order.

COUNT THREE

10. On or about January 24, 1972, for the purpose of inducing the sale of a course in computer programming/data processing, defendant, acting through his authorized agents:

(1) Represented to Mr. Dennis Shoemaker of Chillicothe, Ohio, that they were licensed in Ohio without further disclosing the meaning of such licensing, in violation of paragraph 3 of the order;

(2) Represented that he was assured of obtaining employment, in violation of paragraph 4 of the order;

(3) Represented to him that he must enroll in the course that same day or he would lose the opportunity to enroll, in violation of paragraph 6

of the order.

(4) Failed to disclose to him either (a) that his contract with the corporation may be turned over to a collection agency or (b) that such action would not affect the cancellation rights accorded him under the contract, in violation of paragraph 8(d) of the order.

COUNT FOUR

11. On or about January 14, 1972, for the purpose of inducing the sale of a course in computer programming, defendant, acting through his authorized agents:

(1) Represented to Mrs. Lois Jean Coleman of Parkersburg, West Virginia, that she would be guaranteed a job in the field for which she would be trained upon completion of the course, in violation of paragraph 4 of the order;

(2) Represented to her that she must

enroll for the course the same day or lose the opportunity to enroll, in violation of paragraph 6 of the order;

(3) Misrepresented to her that the school was passed and approved by the United States Government, in violation of paragraph 3 of the order;

(4) Failed to disclose to her, either (a) the terms and conditions under which a student may discontinue or cancel enrollment prior to completion of the course or (b) such refund or adjustment defendant would make upon cancellation, in violation of paragraph 8(c) of the order:

(5) Failed to disclose to her that her contract may be turned over to a collection agency and that such action would not affect her cancellation rights, in violation of paragraph 8(d) of the order.

COUNT FIVE

12. In or about January, 1972, for the

of inducing the sale of a course in computer programming to Mr. Charles E. Harris of Memphis, Tennessee, defendant, acting through his authorized agents:

(1) Represented to him that the school was licensed in Tennessee without further disclosing the meaning of such licensing, in violation of paragraph 3 of the order;

(2) Represented to him that he would be assured employment in the field for which he would be trained upon completion of the course, in violation of paragraph 4 of the order;

(3) Represented to him that an aptitude test given to him by defendant was adequate to measure his aptitude or ability to successfully complete the course, in violation of paragraph 5 of the order;

(4) Failed to disclose to him orally either (a) the terms and conditions

under which a student may discontinue or cancel enrollment prior to completion of the course or (b) such refund of adjustment defendant would make upon cancellation, in violation of paragraph 8 (c) of the order; and

(5) Failed to disclose to him that his contract may be turned over to a collection agency and that such action would not affect his cancellation rights, in violation of paragraph 8(d) of the order.

COUNT SIX

13. On or about January 24, 1972, for the purpose of inducing the sale of a course in computer programming/data processing, to Mr. Larry D. Sheppard of Chillicothe, Ohio, defendant acting through his authorized agents:

(1) Represented to him that he was assured employment in the field for which he would be trained upon completion of the course; in violation of paragraph 4 of the order; and

(2) Failed to disclose to him either (a) that his contract may be turned over to a collection agency or (b) that such action would not affect his cancellation rights under the contract, in violation of paragraph 8(d) of the order.

COUNT SEVEN

14. In or about January, 1972, for the purpose of obtaining leads to prospective purchasers of courses of study in the school, defendant acting through his authorized agents, represented to Mr. George Dunlap of Memphis, Tennessee, that he could receive free information about the school and failed to inform him then or within a reasonable time thereafter that defendant's sales representative would call upon him, in violation of paragraph 7 of the order. Thereafter, in or about January, 1972, for the purpose of inducing the sale of a course in computer programming to Mr. Dunlap, defendant, acting through his authorized agents:

(1) Represented to him that they were

licensed in the State of Tennessee without further disclosing the meaning of such licensing, in violation of paragraph 3 of the order;

(2) Represented to him that an aptitude test given him by defendant was adequate to measure his aptitude or ability to successfully complete the course, in violation of paragraph 5 of the order;

(3) Failed to disclose to him, orally either (a) the terms and conditions under which a student may discontinue or cancel enrollment prior to completion of the course or (b) such refund or adjustment defendant would make upon cancellation, in violation of paragraph 8(c) of the order;

(4) Failed to disclose to him that his contract may be turned over to a collection agency and that such action would not affect his cancellation rights under the contract, in violation

of paragraph 8(d) of the order.

COUNT EIGHT

15. In or about December, 1971, for the purpose of inducing the sale of a course in computer programming to Mr. Bobbly L. Newson, IV, of Memphis, Tennessee, defendant, acting through its authorized agents:

(1) Represented to him that the school was connected with International Business Machines Corporation (IBM) in violation of paragraph 2 of the order;

(2) Failed to disclose to him, either (a) the terms and conditions under which a student may discontinue or cancel enrollment prior to completion of the course or (b) such refund or adjustment defendant would make upon cancellation, in violation of paragraph 8(c) of the order and;

(3) Failed to disclose to him that his contract may be turned over to a collection agency and that such action

would not affect his cancellation rights under the contract, in violation of paragraph 8(d) of the order.

COUNT NINE

16. In or about May, 1972, for the purpose of inducing the sale of a course in computer programming to Ms. Mary E. Phariss, of Memphis, Tennessee, defendant, acting through his authorized agents:

(1) Represented to her that the school was registered in the State of Tennessee without further disclosing the meaning of such registration in violation of paragraph 3 of the order;

(2) Represented to her that she was assured employment in the field for which she would be trained upon completion of the course, in violation of paragraph 4 of the order;

(3) Represented to her that an aptitude test given her by defendant was

adequate to measure her aptitude or ability to successfully complete the course, in violation of paragraph 5 of the order.

(4) Represented to her that she must enroll for the course that same day or her opportunity to enroll would be lost, in violation of paragraph 6 of the order.

(5) Failed to disclose to her orally either (a) the terms and conditions under which a student may discontinue or cancel enrollment prior to completion of the course or (b) such refund or adjustment defendant would make upon cancellation, in violation of paragraph 8(c) of the order;

(6) Failed to disclose to her that her contract may be turned over to a collection agency and that such action would not affect her cancellation rights under the contract, in violation of paragraph 8(d) of the order.

COUNT TEN

17. On or about January 25, 1972, for the purpose of inducing the sale of a course in computer programming to Mr. Eddie Westbrook, Jr., of Memphis, Tennessee, defendant, acting through his authorized agents:

(1) Represented to him that the school was licensed in the State of Tennessee without further disclosing the meaning of such licensing, in violation of paragraph 3 of the order;

(2) Represented to him that he was assured employment in the field for which he would be trained upon completion of the course, in violation of paragraph 4 of the order;

(3) Represented to him that he must enroll for the course that same day or his opportunity to enroll would be lost, in violation of paragraph 6 of the order.

(4) Failed to disclose to him, either (a) the terms and conditions under which a student may discontinue or cancel

enrollment prior to completion of the course or (b) such refund or adjustment defendant would make upon cancellation, in violation of paragraph 8(c) of the order and;

(5) Failed to disclose to him that his contract may be turned over to a collection agency and that such action would not affect his cancellation rights under the contract, in violation of paragraph 8(d) of the order.

COUNT ELEVEN

18. In or about February, 1972, for the purpose of inducing the sale of a course in computer programming/data processing, to Ms. Della M. Thomas of Memphis, Tennessee, defendant, acting through his authorized agents:

(1) Represented to her that they were licensed in the States of Tennessee and Kansas without further disclosing the meaning of such licensing, in violation of paragraph 3 of the order;

(2) Represented to her that she was guaranteed employment in the field

for which she would be trained upon completion of the course, in violation of paragraph 4 of the order.

(3) Represented to her that an aptitude test given her by defendant was adequate to measure her aptitude or ability to successfully complete the school's course in violation of paragraph 5 of the order;

(4) Failed to disclose to her, orally either (a) the terms and conditions under which a student may discontinue or cancel enrollment prior to completion of the course or (b) such refund or adjustment defendant would make upon cancellation, in violation of paragraph 8(c) of the order and;

(5) Failed to disclose to her that her contract may be turned over to a collection agency and that such action would not affect her cancellation rights under the contract, in violation of paragraph 8(d) of the order.

COUNT TWELVE

19. In or about January, 1972, for the purpose of inducing the sale of a course in computer programming to Mr. James S. Unger of Berkley Springs, West Virginia, defendant, acting through his authorized agents:

(1) Represented to Mr. Unger that he must enroll for the course that same day or his opportunity to enroll would be lost, in violation of paragraph 6 of the order;

(2) Represented to him that he would be assured employment, in violation of paragraph 4 of the order;

(3) Failed to disclose to him, orally either (a) the terms and conditions under which a student may discontinue or cancel enrollment prior to completion of the course or (b) such refund or adjustment defendants would make upon cancellation, in violation of paragraph 8(c) of the order and;

(4) Failed to disclose to him that his contract may be turned over to a

cancellation agency and that such action would not affect his cancellation rights under the contract, in violation of paragraph 8(d) of the order.

COUNT THIRTEEN

20. In or about January, 1972, for the purpose of inducing the sale of a course in computer programming to Mr. James A. Casto of Mineral Wells, West Virginia, defendant, acting through his authorized agents:

(1) Represented to Mr. Casto that he was guaranteed employment in the field for which he would be trained upon completion of the course, in violation of paragraph 4 of the order;

(2) Represented to him that he must enroll for the course that same day or his opportunity to enroll would be lost, in violation of paragraph 6 of the order and;

(3) Failed to disclose to him that his contract may be turned over to a

collection agency and that such action would not affect his cancellation rights under the contract, in violation of paragraph 8(d) of the order.

COUNT FOURTEEN

21. In or about February, 1971, for the purpose of inducing the sale of a course in computer programming to Mr. Johnny L. Nestor of Fairmont, West Virginia, defendant, acting through his authorized agents:

(1) Represented to him that the school was licensed in the State of West Virginia without further disclosing the meaning of such licensing, in violation of paragraph 3 of the order;

(2) Represented to him that he was assured employment in the field for which he would be trained upon completion of the course, in violation of paragraph 4 of the order:

(3) Represented to him that he must

enroll for the course that same day or his opportunity to enroll would be lost, in violation of paragraph 6 of the order;

(4) Failed to disclose to him orally, either (a) the terms and conditions under which a student may discontinue or cancel enrollment prior to completion of the course or (b) such refund or adjustment defendant would make upon cancellation, in violation of paragraph 8(c) of the order;

(5) Failed to disclose to him that his contract may be turned over to a collection agency and that such action would not affect his cancellation rights under the contract, in violation of paragraph 8(d) of the order.

COUNT FIFTEEN

22. In or about May, 1971, for the purpose of obtaining leads to prospective purchasers of courses of study in the school, defendant acting through his authorized agents, represented

to Mr. James Edward Miller of Parkersburg, West Virginia, that he could receive free information about computer programming and failed to inform him then or within a reasonable time thereafter that defendant's sales representative would call upon him, in violation of paragraph 7 of the order. Thereafter, in or about July, 1971, for the purpose of inducing the sale of a course in computer programming to Mr Miller, defendant, acting through his authorized agents:

(1) Represented to him that he was assured employment in the field for which he would be trained upon completion of the course, in violation of paragraph 4 of the order;

(2) Failed to disclose to him, orally either (a) the terms and conditions under which a student may discontinue or cancel enrollment prior to completion of the course, in violation of paragraph 4 of the order; and

(3) Failed to disclose to her that her contract may be turned over to a

collection agency and that such action would not affect his cancellation rights under the contract, in violation of paragraph 8(d) of the order.

COUNT SIXTEEN

23. In or about December 1971, for the purpose of inducing the sale of a course in computer programming to Ms. Leslie J. Jackson of Seattle, Washington, defendant, acting through his authorized agents:

(1) Represented to her that she must enroll for the course that same day or her opportunity to enroll would be lost, in violation of paragraph 6 of the order;

(2) Represented to her that the defendant guaranteed her a job in the field for which she would be trained upon completion of the course, in violation of paragraph 4 of the order; and,

(3) Failed to disclose to her that her contract may be turned over to

a collection agency and that such action would not affect her cancellation rights under the contract, in violation of paragraph 8(d) of the order.

COUNT SEVENTEEN

24. On or about January 21, 1972, for the purpose of inducing the sale of a course in business machines operation to Ms. Geraldine Hallenbeck of Seattle, Washington, defendant, acting through his authorized agents:

(1) Represented to her that the school was licensed in the State of Washington without further disclosing the meaning of such licensing, in violation of paragraph 3 of the order;

(2) Represented to her that she was assured employment in the field for which she would be trained upon completion of the course, in violation of paragraph 4 of the

Order;

(3) Represented to her that she must enroll for the course that same day or her opportunity to enroll would be lost, in violation of paragraph 6 of the order; and

(4) Failed to disclose to her that her contract may be turned over to a collection agency and that such action would not affect her cancellation rights under the contract, in violation of paragraph 8(d) of the order.

COUNT EIGHTEEN

25. In or about December, 1971, for the purpose of inducing the sale of a course in computer programming to Ms. Lis H. Miller of Seattle, Washington, defendant acting through his authorized agents:

(1) Represented to her that the school was licensed in the State of Washington without further disclosing the meaning of such licensing,

in violation of paragraph 3 of the order;

(2) Represented to her that she must enroll for the course that same day or her opportunity to enroll would be lost, in violation of paragraph 6 of the order, and

(3) Misrepresented to her the qualifications which students must possess to be accepted for enrollment in the course, in violation of paragraph 5 of the order.

COUNT NINETEEN

26. In or about October, 1971, for the purpose of inducing the sale of a course of study in the field of computer programming to Mr. Rick C. Sapp of Seattle, Washington, defendant, acting through his authorized agents:

(1) Represented to him that defendant guaranteed him a job upon completion of the course, in violation of paragraph 4 of the order.

(2) Represented to him that the defendant was licensed in Washington without further disclosing the meaning of any such licensing, in violation of paragraph 3 of the order;

(3) Failed to disclose to him orally either (a) the terms and conditions under which a student may discontinue or cancel enrollment prior to completion of the course or (b) such refund or adjustment defendant would make upon cancellation, in violation of paragraph 8(c) of the order, and

(4) Failed to disclose to him that his contract may be turned over to a collection agency and that such action would not affect his cancellation rights under the contract, in violation of paragraph 8(d) of the order.

COUNT TWENTY

27. In or about November, 1971, for the purpose of inducing the sale of a course in

computer programming to Mrs. Marion E. Beumeler of Seattle, Washington, defendant, acting through his authorized agents:

(1) Represented to her that she was guaranteed employment in the field for which she would be trained upon completion of the course, in violation of paragraph 4 of the order;

(2) Represented to her that she must enroll for the course that same day or her opportunity to enroll would be lost, in violation of paragraph 6 of the order; and

(3) Failed to disclose to her that her contract may be turned over to a collection agency and that such action would not affect her cancellation rights under the contract, in violation of paragraph 8(d) of the order.

PRAYER

WHEREFORE, plaintiff requests:

1. That the Court enter its judgment of civil penalty against the defendant as

authorized by law for each and every violation (Count) of the Federal Trade Commission's order of July 29, 1969.

2. That the Court grant, pursuant to equity and Sections 5(1) and (9) of the Federal Trade Commission Act (15 U.S.C. 45(1) and 49), appropriate injunctive relief requiring defendant to comply with the order of the Federal Trade Commission.

3. That the defendant pay the cost of suit.

4. That the Court award such additional relief as may be just and proper.

DONALD J. STOHR
U.S. Attorney for
the Eastern District
of Missouri.

BY: _____
Assistant U.S. Attorney

Maurice S. Meyer,
Assistant Director
for Compliance.

GREGORY B. HOVENDON,
Chief, Consumer Affairs
Section Anti-Trust
Division

Walter C. Gross, III
Attorney

Federal Trade Commission,
Washington, D.C. 20580

Attorney

Department of Justice
Washington, D.C.

APPENDIX C

ANSWER

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	Civil Action No.
	)	74-572C (1)
vs	)	
	)	
CHARLES R. JOHNSON,	)	
	)	
Defendant.	)	

ANSWER

Comes now Charles Johnson, defendant, by and through his attorney, Theodore F. Schwartz, and for his answer to the plaintiff's Complaint states:

1. Defendant admits the allegations contained in paragraphs 1 through 6 of plaintiff's complaint.

2. Defendant adopts for his answer to paragraph 7 plaintiff's allegations set out in paragraph 1 of plaintiff's complaint.

3. Defendant denies each and every other allegation contained in Counts One through Twenty of plaintiff's complaint.

WHEREFORE, having fully answered, Charles R. Johnson, defendant, prays this honorable court that plaintiff's claim be dismissed and that he go hence with his costs.

ACKERMAN, SCHILLER AND SCHWARTZ

THEODORE F. SCHWARTZ
Attorney for defendant
7701 Forsyth Suite 553
Clayton, Missouri 63105
863-4654

JURY TRIAL REQUESTED

PROOF OF SERVICE

THE UNDERSIGNED CERTIFIES THAT A COMPLETE COPY OF THIS INSTRUMENT WAS SERVED UPON THE ATTORNEY OF RECORD OF EACH PARTY TO THE ABOVE STYLED CAUSE BY ENCLOSING THE SAME IN ENVELOPES ADDRESSED TO SAID ATTORNEYS AT THEIR BUSINESS ADDRESS AS DISCLOSED ON THE PLEADINGS OF RECORD HEREIN, WITH FIRST-CLASS POSTAGE FULLY PREPAID, AND BY DEPOSITING SAID ENVELOPES IN A U. S. POST OFFICE MAIL BOX AT CLAYTON, MISSOURI, ON THE 2nd DAY OF October, 1974.

Theodore Schwartz

BEST COPY AVAILABLE

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

*

No. . .75-1959. . . . September Term, 1975. .

United States of America,

Appellee,

vs.

Charles R. Johnson,

Appellant.

APPEAL FROM the United States District Court for the Eastern District of Missouri.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

ON CONSIDERATION WHEREOF, it is here ordered and adjudged by this Court, that the judgment of the said District Court, in this

cause, be, and the same is hereby affirmed.

Costs taxed in favor of Appellee: August 13, 1976

Costs of printing 10 copies of brief: $15.60

Costs of printing 5 copies of supplemental appendix: 92.40

Total costs of Appellee for recovery from Appellant in the U.S. District Court: $108.00

A true copy.

Attest:

Clerk, U.S. Court of Appeals, 8th Circuit.

September 28, 1976

FILED
JAN 26 1977
MICHAEL RODAK, JR., CLERK

No. 76-727

In the Supreme Court of the United States

OCTOBER TERM, 1976

CHARLES R. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

DONALD I. BAKER,
Assistant Attorney General,

CARL D. LAWSON,
PETER L. DE LA CRUZ,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-727

CHARLES R. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 43-51) is reported at 541 F. 2d 710. The judgment (App. A, *infra*, p. 1a)[1] and findings of fact and conclusions of law (App. B, *infra*, pp. 2a-8a) of the district court, which are set forth in the appendix to this brief, are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 90-91) was entered on September 28, 1976. The petition for a writ of certiorari was filed on November 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1] "App." refers to the appendix to this brief. "Pet. App." refers to the appendix to the petition.

QUESTION PRESENTED

Whether the district court's findings that the chief executive and sole stockholder of a corporation, who was personally subject to a Federal Trade Commission consent order enjoining certain sales practices, had not made good faith efforts to halt those practices, were clearly erroneous.

STATUTE INVOLVED

Section 5(*l*) of the Federal Trade Commission Act, as amended, 87 Stat. 591, 15 U.S.C. (Supp. V) 45(*l*), is set forth as Appendix C of this brief.

STATEMENT

On July 29, 1969, the Federal Trade Commission entered a consent order prohibiting certain unfair or deceptive practices in the sale of home study and resident electronic data processing courses by the Technical Education Corporation (TEC), its officers, and petitioner Charles R. Johnson, both as an individual and an officer of TEC (App. B, *infra*, p. 2a). Mr. Johnson was the chief executive officer, treasurer, and sole stockholder of TEC (*id.* at 6a).

The United States filed a civil complaint against Mr. Johnson on August 14, 1974 (Pet. App. 53-86) under Section 5(*l*) of the Federal Trade Commission Act,[2] 15 U.S.C. (Supp. V) 45(*l*), seeking both civil penalties and injunctive relief for violations of the Commission's order. In his answer to the complaint, Johnson admitted that he "formulated, directed and controlled the acts and practices of the corporation" at all times material to the complaint (Pet. App. 54, 88).

The case was tried to the court, which found that petitioner had violated the consent order (App. B, *infra*

[2]TEC was not named as a defendant. A secured creditor had seized the assets of TEC in late 1973. Although the corporation has not been dissolved or adjudicated a bankrupt, petitioner Johnson testified that it has no assets apart from a tax refund claim (Tr. of Trial 185-186, 208-209).

pp. 2a-6a). Pursuant to a stipulation, the court admitted into evidence affidavits of 20 individuals to whom the TEC sales presentations had been made. Each affiant stated that TEC sales representatives solicited their enrollment through a sales presentation which violated at least two and as many as six provisions of the Commission's order (GX 3-22; Tr. of Trial 2, 5).[3]

The affidavits revealed that the violations had been widespread and not limited to a few salesmen or a particular geographic area. The affidavits and other evidence demonstrated that the company made a systematic effort: to mislead prospective purchasers of the course into believing that TEC relied upon aptitude test scores in selecting students, and that jobs were available for those who took the course; to misrepresent the significance of state licenses; and to pressure prospective purchasers to sign contracts by telling them the salesmen would not return if they did not sign at the time of the visit (GX 3-22, 24B, 24F; Tr. of Trial 32-33, 35-37, 105-106, 135-136; App. B, *infra*, p. 7a).

The district court entered judgment against petitioner on each of the 20 counts, and imposed a penalty of $2,000 on each count, for a total of $40,000 (App. A, *infra*, p. 1a). It also permanently enjoined petitioner from violating the Commission's order (App. A, *infra*, p. 1a). The court concluded that petitioner was responsible for the acts of the TEC salesmen, that he made no effort to explain the import of the order or to enforce its provisions with salesmen in the field, and that providing them with copies of it did not constitute compliance (App. B, *infra*, pp. 7a, 8a).

The court of appeals unanimously affirmed. It held that as founder, owner and operator of TEC, Johnson had an affirmative duty to assure compliance with the order (Pet. App. 46), and that in the entire context of TEC's operations,

[3]"GX" refers to government exhibits in the district court. Exhibits 3-22 and 24B were also reproduced in the Supplemental Appendix before the court of appeals, pp. 7-110.

merely giving each salesman a copy of the order was not enough to constitute a good faith effort to comply (Pet. App. 47).

ARGUMENT

The decision of the court of appeals is correct; it is consistent with the decisions of this Court and of the other circuits; and it does not warrant review by this Court.

The petitioner's assertion that the "judgment of the district court imposes a standard of strict liability upon the officers of a corporation" (Pet. 39) misconstrues the nature of the decision. The Commission's order ran against Johnson individually and as a corporate officer and thus gave him notice that he was required to assure compliance by his corporation.[4] The court of appeals merely held that Johnson had affirmative obligations under the Commission's order to take effective steps to insure compliance with that order by his corporation[5] and concluded that the district court did not err in finding that he had failed to fulfill those obligations.

---

[4]Although petitioner states that "[t]he question of his [Johnson's] inclusion in the Order is really not before the Court" (Pet. 31), the petition nonetheless implies that the Commission acted improperly in naming Johnson as an individual respondent in the original order. The Commission properly did so. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 119-120.

[5]The conclusion that the Commission's order imposes affirmative obligations upon corporate officers is accepted law. Corporate officers have been subjected to criminal contempt liabilities for failing to fulfill such obligations. See *In re Holland Furnace Company*, 341 F. 2d 548 (C.A. 7), certiorari denied *sub nom. Holland Furnace Co.* v. *Schnackenberg*, 381 U.S. 924, rehearing denied, 382 U.S. 873, affirmed on other grounds *sub nom. Cheff* v. *Schnackenberg*, 384 U.S. 373; *In re Dolcin Corporation*, 247 F. 2d 524 (C.A. D.C.), reconsideration denied, 247 F. 2d 532, certiorari denied *sub nom. Dolcin Corp.* v. *United States Court of Appeals for the District of Columbia Circuit*, 353 U.S. 988; cf. *United States* v. *Park*, 421 U.S. 658.

Petitioner's assertion that "[t]here was nothing more that Johnson could humanly do to insure the corporation's compliance with the Federal Trade Commission's order" (Pet. 40) is belied by the record. It reveals that petitioner, in fact, did very little to alter the sales practices which the decree was designed to eliminate. The district court found that Johnson made no effort to enforce the order apart from sending copies of it to the salesmen (App. B, *infra*, p. 7a). The court of appeals carefully reviewed the record and held that finding to be correct, noting (Pet. App. 47): "[W]e are not persuaded that Johnson in good faith did everything in his power as the chief executive of T.E.C. to assure compliance with the F.T.C. order." There is no reason for this Court further to review these factual findings by the two courts below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

DONALD I. BAKER,
Assistant Attorney General.

CARL D. LAWSON,
PETER L. DE LA CRUZ,
Attorneys.

JANUARY 1977.

DOJ-1977-01

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

CHARLES R. JOHNSON, DEFENDANT.

No. 74-572 C (1)

JUDGMENT

Findings of fact and conclusions of law dated this date are hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that a judgment is rendered for the plaintiff and against defendant on each of the twenty counts of the complaint and the defendant is fined $2,000 on each count, or a total of $40,000.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendant Charles R. Johnson be and is hereby permanently enjoined from violating the order of the Federal Trade Commission, dated July 29, 1969, which became final on October 6, 1969.

Costs are assessed against the defendant.

Dated this 20th day of November, 1975.

/s/ James H. Meredith

United States District Judge

FILED

NOV. 21, 1975

WILLIAM D. RUND, Clerk
U.S. District Court
E. District of Mo.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

CHARLES R. JOHNSON, DEFENDANT.

No. 74-572 C (1)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was tried to the Court without a jury. The Court has been fully advised and makes the following findings of fact:

FINDINGS OF FACT

1. The United States of America, acting upon the certification to the Attorney General by the Federal Trade Commission, brings this action under 15 U.S.C. 45(1), 49, and 408(c), to recover civil penalties for a violation of an order to cease and desist issued by the Commission on July 29, 1969, which became final on October 6, 1969.

2. The order contained the following language:

> "IT IS ORDERED that respondents Technical Education Corporation, a corporation, and its officers, and C. R. Johnson, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of courses of study and instruction in the field of data processing or any other subject in commerce,

as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

> "(1) Representing, directly or by implication, that employment is being offered when the real purpose of such offer is to obtain leads to prospective purchasers of respondents' course.
>
> "(2) Representing, directly or by implication, that respondents or their school are sponsored by, approved by or have any connection with the International Business Machines Corporation (IBM) other than to provide training or instruction in the operation of equipment manufactured or distributed by IBM; or misrepresenting, in any manner, the status or affiliation of respondents, their school or their sales representatives.
>
> "(3) Representing, directly or by implication, that respondents' school is licensed or registered in any state unless it is so licensed or registered and unless in immediate connection with such representation respondents clearly and conspicuously disclose the meaning, if any, of such licensing or registration; or misrepresenting, in any manner, the import or effect of licensing, registration or any other action by a state or other jurisdiction.
>
> "(4) Representing, directly or by implication, that persons who complete respondents' courses are guaranteed or assured of employment in the positions for which they have been trained; or misrepresenting, in

any manner, the ability, efforts or facilities of respondents or their placement service for assisting persons completing respondents' courses in obtaining employment.

"(5) Representing, directly or by implication, that an aptitude or other test is adequate to measure the aptitude or ability of an enrollee to successfully complete respondents' course and attain the advertised objectives of the course unless such test is based upon established personnel testing practices in the data processing field; or misrepresenting, in any manner, the selectivity exercised by respondents in enrolling students in their courses or the qualifications which students must possess to be accepted for enrollment.

"(6) Representing, directly or by implication, that a prospective student may enroll in respondents' home study courses only at the time of the visit by respondents' sales representative or that if the student is not enrolled at the time the opportunity to enroll will have been lost; or misrepresenting, in any manner, that the opportunity to enroll in respondents' courses is limited.

"(7) Inviting or obtaining inquiries concerning respondents' courses from prospective students without clearly informing such persons reasonably in advance thereof that respondents' sales representative will call upon them and seek to enroll them in one of respondents' courses.

"(8) Failing to:

(a) Furnish to prospective students at time of enrollment a printed statement clearly and conspicuously disclosing (1) the exact terms and conditions under which a student may discontinue his or her enrollment prior to completion of the course in which enrolled and (2) such refund of money, if any, or other adjustment that respondents will make in the obligation of the student who requests withdrawal or discontinuance in accordance with respondents' terms and conditions therefor.

(b) Set forth the disclosures required by (a) preceding clearly and conspicuously in and as a part of the enrollment application or such documents as may be executed by prospective purchasers of respondents' courses.

(c) Require their sales representatives or other persons who visit prospective purchasers of respondents' courses and solicit their enrollments in respondents' courses to orally inform and advise prospective purchasers of the information required to be disclosed by (a) and (b) preceding.

(d) Clearly and conspicuously disclose to prospective purchasers of respondents' courses prior to enrollment that the collection of student accounts may be undertaken by a

designated agency but that such action does not affect such rights to discontinuance or affirmative defenses as the student may have.

3. C. R. Johnson was the president of Technical Education Corporation from October 23, 1968, to the time of trial. He was also the chief executive officer, the treasurer, and the sole stockholder. The principal place of business of Technical Education Corporation was in St. Louis, Missouri, and defendant lived in St. Louis, Missouri, until recently. During the year 1969 gross sales of Technical Education Corporation were approximately $1,300,000; in 1970, $1,500,000; and in 1971, $4,900,000.

4. The method of operation of Technical Education Corporation was, basically:

(a) to place ads in the newspapers for programmers or to send direct mail to prospects after which a telephone call would be placed to the prospect and a salesman would call on the prospect. The salesman would sign up the prospect for a course of study which included an agreement to pay various amounts ranging from $495 to $1,390. The prospects also signed an application for a HEW student loan.

(b) Technical Education Corporation also had a boiler room operation where telephone operators would call prospects and ask if they would be interested in an $800 a month job or if they had a young relative who would like such a job.

(c) In some instances, the applicants took an aptitude test but the salesmen were instructed to pass all applicants if they could "walk and chew gum".

(d) The salesman stated that the applicant would have a good paying job immediately upon completion of the course and in many instances advised the applicant that there was a limited number of places and they must either sign while the salesman was with them or the opportunity would be lost.

5. The contracts were sold to various financial houses without advising applicants.

6. The government's action alleged a violation of the Federal Trade Commission order in twenty counts. The government sustained their burden of proof on each of the twenty counts by showing a violation of said order in one or more different ways by persons representing Technical Education Corporation.

7. Defendant did have sent to the various salesmen a copy of the Federal Trade Commission cease and desist order, had them acknowledge receipt of the same, and return that to the office. No effort was made, however, to explain the import of the order or to enforce its provisions with the various salesmen in the field.

8. The defendant testified that a loan company had taken over the lists, furniture, and assets of the Technical Education Corporation, but that no formal foreclosure had been accomplished. He testified that the Technical Education Corporation is not now doing business and that he has purchased a company which is distributing burglar alarms.

9. A penalty of $2,000 on each count, or a total of $40,000, will be assessed against defendant Charles R. Johnson.

CONCLUSIONS OF LAW

1. This Court has jurisdiction based on 28 U.S.C. 1331(a), 1337, 1345, and 1355.

2. The Federal Trade Commission decree was directed against both Technical Education Corporation and the defendant, who was responsible for the acts of the salesmen of Technical Education Corporation.

3. The fact that defendant Charles R. Johnson sent a copy of the cease and desist order of the Federal Trade Commission to his salesmen is not a defense to this action.

4. Defendant will be permanently enjoined from violating the terms of the Federal Trade Commission cease and desist order and fined a total of $40,000.

Dated this 20th day of November, 1975.

/s/ James H. Meredith

United States District Judge

Filed:

Nov. 21 1975

William D. Rund, Clerk
U.S. District Court
E. District of Mo.

APPENDIX C

Section 5(*l*) of the Federal Trade Commission Act, as amended, 87 Stat. 591, 15 U.S.C. (Supp. V) 45(*l*), provides that:

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.